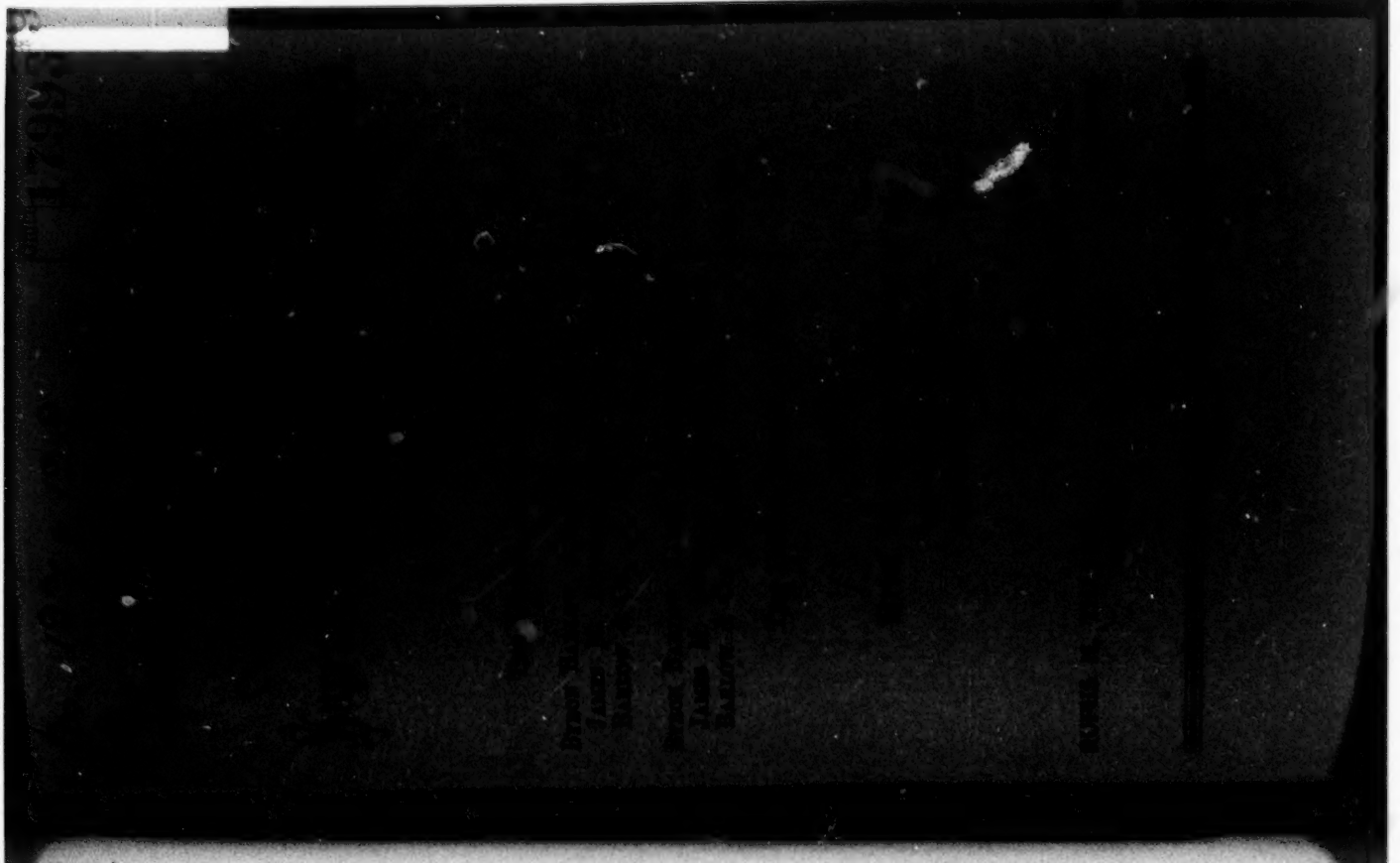

IN THE

Supreme Court of the United States.

October Term, 1901.

THE UNITED STATES, *Appellant*, v. BYRON BARLOW, JAMES E. BLACKWELL and JAMES M. DOUGAN, partners as BYRON BARLOW & CO.	No. 127.
BYRON BARLOW, JAMES E. BLACKWELL and JAMES M. DOUGAN, partners as BYRON BARLOW & CO. *Appellants*, v. THE UNITED STATES.	No. 128.

BRIEF FOR BYRON BARLOW *ET AL.*

I. Statement of the Case.

Nature and History of the Suit.

This case comes before this court by cross appeals from a judgment of the Court of Claims, which awarded to the claimants the sum of twenty-four thousand nine hundred and forty-two dollars and ninety-nine cents ($24,942.99).

The suit arises out of the construction by the claimants of a dry dock at Puget Sound, in the State of Washington, under contract between them and the government, dated October 29, 1892 (Record, pp. 15–22). The price fixed in the contract (p. 20) was four hundred and ninety-one thousand four hundred and sixty-five dollars ($491,465).

The greater part of the claim was brought before the

court by voluntary petition of the claimants (pp. 8–14). One item, however, amounting to one thousand one hundred and fifty-six dollars and seventy-six cents ($1,156.76), was referred by the Secretary of the Treasury under Revised Statutes, section 1063 (p. 1), and was made the subject of a separate petition (pp. 1–8). The two cases were consolidated for trial (p. 15). The findings of fact, opinion and judgment deal with the claim in its entirety.

Change of Sandstone.

The principal item which formed the subject of controversy in the Court of Claims, and which gives rise to the appeal of the United States to this court, arises out of a change of the stone required for the ashlar of the dry dock.

Ashlar is defined by the Oxford Dictionary as "Masonry constructed of square, hewn stones; opposed to rubble work."

On this point the specifications, which form a part of the contract (pp. 22–33), provided, under the head of "Stone Masonry," as follows (p. 30):

"The ashlar must be of granite or sandstone, of quality approved by the engineer. All stones must be hard, clean, and free from seams and imperfections, and of good bed and build. They must be laid true on their natural beds, and without pinning."

The Court of Claims finds in regard to the stone (Finding IV, pp. 34, 35):

"At the inception of the building of this dock certain sandstone, known as Tenino sandstone, was submitted by the contractors to the defendants' civil engineer in charge of said work, and was by said engineer accepted as a suitable and proper stone for use in said dry dock, under that clause of the specifications that 'the ashlar must be of granite or sandstone of quality approved by the engineer.' The claimants had submitted two such

bids. The first of these, based on the use of sandstone, was much the lower and was accepted.

"From the beginning of work under the contract until the 29th of August, 1894, when a large portion of the same had been completed, U. S. G. White, civil engineer, United States Navy, was the engineer in charge of the work on behalf of the government. Shortly after the inception of work the claimants tendered to him a sample of sandstone which they stated they proposed to use in the ashlar of the dry dock. They at the same time offered to exhibit to said engineer the quarry from which said stone was taken. In pursuance of this offer said engineer, early in the spring of 1893, visited said quarry, which was situated at Tenino, in the State of Washington, in order to inspect the same and to learn therefrom whether its stone was suitable for use in the dry dock construction. He there found a quarry open from 300 to 400 feet along the ledge and faced about 40 feet in depth and equipped with proper appliances for taking the stone out and working it. He made a careful examination of the face and satisfied himself as to its uniformity and freedom from sand, mica, and clay pockets and pebbles or bowlders; noted the reaction of the stone under the channelers then in operation; visited the work where the stone was being sawed to dimensions, and noted the reaction under the saws; noted carefully the abrading power of the stone when used as a grindstone; took hand tools and tried the stone; examined unused blocks of the stone that had been exposed to the weather for a long time to detect any signs of disintegration or deterioration from such exposure; visited the boiler-room of the works and examined the stone which was in use as lining to the furnaces under the boilers that supplied power for the works, and found no evidences of any breaking down or disintegration from the heat to which the stone had been and was being subjected; made numerous examinations with a glass magnifying 6 or 8 diameters, looking to the detection of any mica or other substances in its composition, and found none, the texture appearing uniform and good under the glass, and he subsequently made a test to determine the percentage of absorption.

"As the result of this examination he approved the sandstone from the Tenino quarry and informed the claimants that the same would be accepted for all work under the contract.

"Tenino sandstone had in fact been used as a lining in the fire box of the boilers at the Tenino quarry for some time; also in the piers of a bridge over the Chehalis River, on the Northern Pacific Railroad, where it was exposed to the action of salt water, and had been so for a number of years without deterioration, and had also been used with success in a number of buildings in western Washington and Portland, Oreg., some of them very high ones.

"Shortly after this examination, to wit, on the 4th day of May, 1893, the claimants, relying upon the assurances thus given by the engineer that stone from the Tenino quarry was approved and would be accepted, entered into a contract with the owners of the quarry to furnish them from said quarry all of the sandstone required for the work."

This contract is set forth in full (p. 36).

It is also found (p. 37):

"Afterwards, and on the 28th day of June, 1893, they entered into a contract with Albert and Louis Beaudette, stonecutters, to cut the stones.

"Thereafter a carload of stone was furnished by the owners of said quarry under their contract, which arrived at the site of the dock on or about the 20th of June, 1893. The amount of this stone, 2,377 cubic feet, at 65 cents per foot, $1,545.05, was included in the vouchers rendered by the claimants in the month of June, 1893."

These vouchers were certified by the civil engineer in charge of the construction of the dry dock, and approved by the commandant of the Navy Yard.

It is also found (p. 37):

"Said voucher was forwarded July 8, 1893, by the commandant at Puget Sound Naval Station, Lieut.-Commander John C. Morong.

"The item for stone was, however, stricken out of the voucher, at the Bureau of Yards and Docks, Navy Department, and the total amount of the voucher was thus reduced to the sum of $12,741.03.

"This action of the Navy Department originated in the receipt by that Department of a communication from a labor organization, the Tacoma Trades Council, of the State of Washington, complaining of the quality of the stone.

"The Department, upon receipt of this complaint, called upon the commandant of the Puget Sound Naval Station for a report on the quality of said stone. He in turn called for a report from the engineer in charge, who reported favorably on the quality of said stone, accompanying his report with letters from the chief engineer of the Northern Pacific Railroad and others acquainted with the use of said stone, and his report was adopted as his own by the commandant of the Puget Sound Naval Station and was forwarded to the Navy Department."

Correspondence followed, in which the claimants maintained the good quality of the stone furnished, and insisted that the complaint against the same originated in labor union troubles (Findings IV, V, pp. 37–41).

It is also found (Finding VI, pp. 41, 42):

"When the attention of the Bureau of Yards and Docks was called to the alleged unfitness of this stone for the purposes required, the Navy Department, through the Chief of the Bureau of Yards and Docks, instituted an examination and inquiry for the purpose of determining the chemical ingredients, geological formation, the tensile strength, the porosity, the crushing strength, and the absorbent qualities of the said Tenino sandstone, and to this end a number of experiments, tests, and observations were had at the bureau of medicine and hygiene at the Watertown Arsenal and at other scientific places by officers in charge of scientific institutions and persons skilled and learned in their respective professions, with the result that said Navy Department, through the Chief of the Bureau of Yards and Docks, reached the conclusion that

said Tenino sandstone was not fit and suitable for the purposes to which it was proposed to use said stone; that said stone did not fulfill the requirements of the contract and specifications as above recited; that it was not a hard stone, nor a clean stone, nor free from imperfections; that its absorbent qualities were too high; that its crushing strength was too low, and that it was in many essential particulars totally unfit and unsuitable and undesirable for the use in the ashlar of this dry dock; and thereupon, to wit, on the 29th day of August, 1894, the contractors were notified of this decision of the Bureau of Yards and Docks and were required to furnish other and better sandstone. From this decision of the Chief of the Bureau of Yards and Docks the claimants appealed to the Secretary of the Navy, who concurred in the opinion of the said Chief of the Bureau of Yards and Docks, and concurred in his order requiring a different and better sandstone. The tests and analyses of said Tenino sandstone were made from samples furnished to the Bureau of Yards and Docks by the contractors and by the commandant of the Puget Sound Station. The delay in arriving at the ultimate determination to require a better quality of sandstone, which was reached on the 24th of August, 1894, was partly caused by the fact that the claimants were in correspondence with the Secretary of the Navy in an endeavor to persuade him to accept said Tenino sandstone. The tests and analyses of said stone, as above recited, were made promptly."

"Upon being notified by the Navy Department that the Tenino sandstone would not be accepted, the claimants—protesting against such requirement—offered stone from Sucia Island and also from Dog Fish Point, which was accepted and used in the construction of the dock" (Finding V, p. 41).

It is also found (Finding VII, p. 42):

"The amount of Tenino sandstone quarried, cut and delivered was 2,349 cubic feet, amounting, at 65 cents a cubic foot, to $1,526.85.

"The claimants had also, before receiving notice of the

rejection of the Tenino sandstone by the Bureau of Yards and Docks, caused to be quarried and cut, but not transported, 7,280 cubic feet, amounting, at 65 cents a foot, less the cost of transportation, 10½ cents a foot, 54½ cents a foot, to $3,967.60, making a total for stone actually quarried and cut, and part of which was delivered, of $5,494.45. That sum, however, has not been paid by the claimants to the owners of the said Tenino stone quarry, nor does it appear that any action or suit has ever been brought against the said claimants for said sum of money.

"The total amount expended by the claimants for furnishing, delivering, and cutting the stone which actually went into the construction of said dry dock from Sucia Island and Dog Fish Point, as aforesaid, was $33,556.23.

"If they had been allowed to furnish Tenino stone they could have done so at a cost of $17,948.80. The additional cost, therefore, to the claimants of furnishing the stone which they did furnish, over and above what it would have cost them to furnish the Tenino stone, is the difference between the two sums last named, amounting to $15,607.43."

The claim arising out of the acceptance of Tenino stone by the engineer in charge and its subsequent rejection by the Department, as above set forth, forms the largest item involved. Upon it the judgment of the Court of Claims was in favor of the claimants.

Other Items.

The remainder of the claim arises out of requirements made from time to time upon the claimants for the performance of certain work in connection with the construction of the dry dock. It was and is maintained on the part of the United States that the performance of the work named in these items was required by the terms of the contract, while on the part of the claimants the contention is that it was extra work for which they are

entitled to be paid a reasonable price and, in the case of one of the items, damages for delay.

The claim set forth in Finding VIII (pp. 42, 43) is for tearing out and relaying foundations for the boilers and boiler-house, amounting to $696.68. This item was disallowed by the Court of Claims.

Finding IX (p. 43) relates to a claim for putting in a concrete toe to protect the piles at a certain point. This work was required by the Navy Department apparently on the ground that the necessity for it was due to a mistake made by the claimants in the construction of the piling. It is found, however, by the Court of Claims that it had no relation to that error, but would have been required irrespectively of any such error having been made. It amounts to $59.35. This item was allowed by the Court of Claims.

Finding X (pp. 43, 44) relates to a claim for the extra cost of ramming and sluicing the fillings of dirt behind the altars, one engineer not having required the contractors to do the work in that way while a subsequent engineer, acting upon a different view and with the approval of the Department, required it to be done. This additional cost amounted to three thousand seven hundred and twenty-two dollars and seventy cents ($3,722.70). This item was disallowed by the Court of Claims.

Finding XI (pp. 44, 45) relates to certain work done by the contractors under direct order of the Secretary of the Navy personally on the work in sinking piles by a method known as the water jet system. The circumstances are fully set forth in the finding. The value of the work amounts to one thousand one hundred and fifty-six dollars and seventy-six cents ($1,156.76). All of this amount was recommended by a board of engineers, whose findings were approved by the Secretary of the Navy, but the

Comptroller of the Treasury refused to allow the payment. The claim was thereupon at the request of the Secretary of the Navy referred by the Secretary of the Treasury to the Court of Claims under Revised Statutes, section 1063. This item was allowed by the Court of Claims.

Finding XII (p. 45) relates to the expense caused to the claimants by the delay incident to the experimentation with the water jet referred to in the last finding. This expense amounts to two thousand six hundred and twenty-five dollars ($2,625). The board of engineers referred to in the last finding reported as its opinion that the contractors were equitably entitled to a reasonable compensation for this expense, although they declared that they were unable to find from the evidence before them what that expense was. The Court of Claims allowed the amount found by it to be the expense incident to the delay.

Conclusions, Opinion and Judgment.

The court decided as conclusions of law (p. 46):

"I. The claimants should recover upon the subject-matters set forth in Findings VII, IX, XI, and XII the sum of $24,942.99.

"II. The claimants should not recover upon the subject-matters set forth in Findings VIII and X."

An elaborate opinion was delivered by Mr. Chief-Justice Nott (pp. 46–52). It concludes as follows:

"The causes of action set forth in Findings VII, IX, XI, and XII are sufficient, in the opinion of the court, to entitle the claimants to recover. As to the causes of action set forth in Findings VIII and X, the court is of the opinion that the claimants should have submitted the requirements of the engineer in charge to the Chief of the Bureau before proceeding with the work. They

were required to do so by the terms of the contract, and authority to compel them to do additional work was thereby reserved to the Chief of the Bureau.

"The judgment of the court is that the claimants recover of the defendants $24,942.99."

Judgment was on May 21, 1900, entered (p. 52) in accordance with the findings, conclusions and opinion of the court in favor of the claimants for twenty-four thousand nine hundred and forty-two dollars and ninety-nine cents ($24,942.99). From this judgment the United States, on June 11, 1900, took an appeal (p. 52). The claimant thereupon, on the same date, took a cross-appeal (pp. 52, 53) from so much of the judgment as disallows the amounts stated in Findings VIII and X. The case is reported, 35 Court of Claims, 514–552.

II. Assignment of Errors.

The claimants hereby assign the following errors in the conclusions of law and judgment of the court:

1. Said court erred in disallowing the items named in Finding VIII (pp. 42, 43), for extra foundations for boiler-house and boilers, amounting to six hundred and ninety-six dollars and sixty-eight cents ($696.68), and in failing to include the same in its judgment.

2. Said court erred in disallowing the item named in Finding X (pp. 43, 44), for ramming and sluicing the fillings behind the altars, amounting to three thousand seven hundred and twenty-two dollars and seventy cents ($3,722.70), and in failing to include the same in its judgment.

III. Brief of Argument.

The Issues.

The entire amount in controversy in this case upon the findings of the Court of Claims is twenty-nine thou-

sand three hundred and sixty-two dollars and thirty-seven cents ($29,362.37). Of this amount the court allowed the sums set forth in Findings VII, IX, XI and XII, aggregating twenty-four thousand nine hundred and forty-two dollars and ninety-nine cents ($24,942.99), and disallowed only those set forth in Findings VIII and X, amounting to four thousand four hundred and nineteen dollars and thirty-eight cents ($4,419.38). The claimants, although cross-appellants, are, therefore, in substance seeking an affirmance of the judgment. This is particularly true with regard to the portions of the claim to which the opinion (pp. 46–52) is almost wholly devoted. The cross-appeal of the claimants seeks only an allowance of two comparatively small items disallowed by the Court of Claims.

Who was Authorized to Determine the Quality of Stone?

The principal controversy relates to the construction of that portion of the specifications annexed to the contract which provides (p. 30) "The ashlar must be of granite or sandstone, of quality approved by the engineer."

What engineer is here referred to?

It is insisted on the part of the claimants that this expression relates to the engineer of the Government placed locally in charge of the construction of the work.

The contract itself in article first (p. 16), being the general provisions of the contract binding the contractors to furnish all the labor, materials, etc. for the construction of the dry dock, provides that they shall perform the same (p. 16) "in accordance with the aforesaid plans and specifications, subject to the approval of the civil engineer, or such other competent officer or person or persons as may for that purpose be designated by the party of the second part."

Such engineer is again referred to in the same paragraph of the contract (p. 17) as follows:

"It is further mutually stipulated and agreed that at and upon the request of the civil engineer, or other officer in charge, any disorderly, careless, or incompetent person or persons employed by the contractors, in or about the work to be done under this contract, shall be at once discharged and not again employed therein."

And again, by paragraph second of the contract (p. 17), the contractors bind themselves to give their personal supervision and attention to the work, and in case of their absence to have a competent representative or foreman present, "and to receive and follow directions relating thereto when given by the civil engineer, or other officer in charge."

Also, by paragraph third (p. 17):

"On the completion of the work the surroundings shall be thoroughly cleaned up, filled, and graded to the established level or levels of the station as the civil engineer, or other officer in charge, may direct," etc.

This view is the one accepted by the Court of Claims.

On the part of the United States it is claimed that this provision is controlled and, so far as this particular question of the approval of the stone is concerned, overridden by the provision contained in paragraph fourteenth of the contract (pp. 21, 22), which is as follows:

"*Fourteenth.* It is expressly understood, covenanted, and agreed, by and between the parties to this contract, that if any doubts or disputes as to the meaning or requirements of anything in this contract, or if any discrepancy appear between the aforesaid plans and specifications and this contract, the matter shall be at once referred for the consideration and decision of the Chief of the Bureau of Yards and Docks, and his decision thereon shall be final, subject, however, to the right of the con-

tractors to appeal from such decision to the Secretary of the Navy, who, in case of such appeal, shall be furnished by the contractors with a full and complete statement of the grounds of their appeal, in writing, and shall thereupon take such action in the premises as, in his judgment, the rights and interests of the respective parties to this contract shall require, and the parties of the first part hereby bind themselves and their heirs and assigns, and their personal and legal representatives, to abide by his, the said Secretary's, decision in the premises."

In view of the fact that both the contract (pp. 15–22) and the specifications (pp. 22–33) contain numerous provisions referring respectively to the engineer, to the Bureau of Yards and Docks and to the Secretary of the Navy, it would be unreasonable to hold that, when one was named as the officer to exercise judgment on a particular subject-matter, some one of the others was meant. An examination of these several provisions shows that the subjects upon which the engineer was to exercise a judgment related to the quality of particular materials or work, which could best be judged by some one on the ground; while the subjects of which the Bureau of Yards and Docks was to judge, such as the amount of insurance required (paragraph fifth, p. 17), were of a general character, as to which the local judgment of some one having an opportunity for a daily view of the work was not so important.

The justice of this discrimination becomes all the more evident from the fact that the "specifications were prepared at the Bureau of Yards and Docks of the Navy Department" (Finding II, p. 22), and not, as in the case of the Brooklyn dry dock, considered by this court in *Simpson* v. *United States*, 172 U. S. 372, by the contractors. They may, therefore, be presumed to have embodied the most careful judgment of the Department as to what was required. When they called for the judgment of the en-

gineer they must be regarded as having contemplated the judgment of the person locally in charge, who would have the best means of judging of the materials furnished and their adaptability to the purpose for which they were designed.

The Provision for Submission of Disputed Questions to the Navy Department.

This view is not at all in conflict with the provisions of the fourteenth article of the contract above quoted relative to "any doubts or disputes as to the meaning or requirements of anything in this contract," or "any discrepancy * * * between the aforesaid plans and specifications and this contract." The question of the quality of a particular stone and its suitableness for the purpose for which it was designed did not constitute a "doubt or dispute as to the meaning or requirements of anything in the contract," much less a "discrepancy between the specifications and the contract." What was required for the ashlar was "sandstone of quality approved by the engineer." No "doubt or dispute" arose between the claimants and the engineer as to the quality of the sandstone. His decision was in its favor. For the Bureau of Yards and Docks to undertake to pronounce upon the quality of the sandstone in opposition to the judgment of the engineer was to arrogate to itself a power vested by the contract in another authority. If, on the other hand, what was intended by the Bureau was not to override the judgment of the engineer *under* the contract, but to depart *from* the contract and order more expensive stone, not contemplated thereby, it must be conceded that to do so was within the power of the Department. But coupled with that power was a correlative obligation to pay to the contractors the additional expense thereby caused to them,

as for something not covered by and outside of the terms of the written contract.

The Court of Claims goes further and holds that if the fourteenth paragraph of the contract was intended as a universal submission of every question of fact and law arising under the contract to the sole arbitrament of the Secretary of the Navy, it must be held void, as against public policy and as ousting the jurisdiction of the courts of law over contracts. In support of this conclusion the court refers (pp. 47, 48) to the case of *Hurst* v. *Litchfield*, 39 N. Y. 377. The syllabus of that case is as follows:

"A stipulation in a written contract for building, etc. that, 'in case any question arises under such contract in relation to the work, both as to value of work added or deducted, the same shall be adjusted by the architect,' is not binding, being against the policy of the common law, and having a tendency to exclude the jurisdiction of the courts provided with ampler means to entertain and decide legal controversies."

Further quotations from that case are given in the opinion of the Court of Claims, and, as is said in that opinion (p. 48), "Many cases are cited, English and American."

In the case of *District of Columbia* v. *Bailey*, 171 U. S. 161, this court decided that the Commissioners of the District of Columbia have no authority to submit all the issues of fact and law in a claim against the District of Columbia to arbitration, and that an award based upon such submission and arbitration is void. It is true this was not done by virtue of any provision in the original contract, but there is no difference in principle. The officers of the United States have no more authority than those of the District of Columbia to submit claims to arbitration.

It may be questioned whether the parties intended

by this provision anything more than the adoption of a practical working rule under the contract, and not the determination of ultimate rights. Much hardship has occurred in the execution of contracts for public works through the fact that contractors who have furnished materials under their contracts have been required to depart therefrom by orders of subordinate officials without submitting the questions to the Department. The typical example of such a case is *Hawkins* v. *United States*, 96 U. S. 689, in which the Government got a much better wall than the contract called for. But this court held that the extra materials, not having been ordered by the responsible head of a department, could not be paid for. In this view the provision for a presentation of the questions involved to the Chief of the Bureau of Yards and Docks, subject to an appeal to the Secretary of the Navy, was probably intended to be conclusive only within the Department, and, so far from depriving the courts of jurisdiction, would supply the very element upon which any responsibility of the Government could properly be based, viz.: the action of the responsible head of the Department.

Besides, even if it be held that the quality of the stone was one of the questions upon which under paragraph fourteenth of the contract the Chief of the Bureau of Yards and Docks, and the Secretary of the Navy on appeal, had the right to pass, their action came too late.

It will hardly be denied that the civil engineer in charge had the right to decide that question in the first instance. The Department in the outset of the execution of the work under the contract expressly left the whole matter to his judgment. The Chief of the Bureau of Yards and Docks in a letter, dated June 30, 1893, to the Commandant of the Puget Sound Naval Station, among other things said (p. 39):

"In the further consideration of the matter the Bureau desires that it may be understood that it decides the contract and specifications to give to the engineer the decision as to the standard of quality, and he is fully authorized thereunder to fix upon the quality of sandstone he requires, by sample or otherwise, and require material equal to it."

The engineer made a most elaborate inspection of the stone and of the quarry whence it came, approved the sandstone, and informed the claimants that the same would be accepted for all work under the contract. The claimants afterwards entered into contract with the owners of the quarry for the stone, and with stonecutters to cut it. It was not until after all this had been done that the Department, acting upon the complaint of a mere intermeddler,—a trades council dissatisfied with the attitude of the claimants or their sub-contractors on the subject of union labor,—made its own examination, and reversed the judgment of the engineer in charge.

The judgment of the engineer in charge ought to be sustained, not only upon the ground that he was the authority, and the sole authority, under the contract to pass upon the quality of the stone, but upon the further ground that, if he were not, the power was delegated to him by the Bureau of Yards and Docks,—was exercised by him,—and important rights had become vested in the claimants and their sub-contractors before any action to the contrary was taken by the Bureau of Yards and Docks or by the Navy Department. No one seems to have assumed more completely than did the Navy Department itself the finality of the engineer's judgment on this subject until a controversy was started, not by any one having a legal interest in the contract, or its execution, or by citizens acting from motives of regard for the public welfare, but by outside persons, whose action in the matter constituted mere impertinence.

The Court of Claims distinguishes an agreement to submit all the questions of fact and law generally under a contract to arbitration from a stipulation to submit the decision of a particular question of fact, such as the measurement of quantities or the qualities of particular materials furnished, to the decision of a specified officer or other person. The latter class of provisions have always been upheld.

Decisions as to Ascertainment of Quality, Amount, etc. by Officer.

To some of the decisions made by this and inferior federal courts as to the effect of measurements, ascertainments, etc. by an officer in such circumstances we now ask the attention of the court. Some of these decisions also reach the fundamental question in this case as to who the officer is whose decision is intended by such stipulations as those found in this contract—whether it is the officer locally in charge, or some superior officer at a distance.

In *United States* v. *Shrewsbury*, 23 Wall. 508, there was a stipulation in an army transportation contract for a board of survey to examine the quantity and condition of the stores transported, with a view to fixing the compensation, liability for loss, etc. The court refers (p. 517) to the fact that "the points of delivery were in the wilds of the West" as supporting its conclusion that "The time and place of delivery were the time and place to ascertain the facts, and to put the evidence in an effectual shape"—thus making the view of the officer on the ground the conclusive one in a case of this character.

Kihlberg v. *United States*, 97 U. S. 398, was another case of an army transportation contract. Here the contract provided that the distance between certain points should "be ascertained and fixed by the chief quartermaster,"

etc. The court in the opinion by Mr. Justice Harlan says (p. 401):

"The parties, however, concurred in designating a particular person—the chief quartermaster of the district of New Mexico—with power not simply to ascertain, but to fix, the distances which should govern in the settlement of the contractor's accounts for transportation. The written order of General Easton to the depot quartermaster at Fort Leavenworth was an exertion of that power. He discharged a duty imposed upon him by the mutual assent of the parties. The terms by which the power was conferred and the duty imposed are clear and precise, leaving no room for doubt as to the intention of the contracting parties. They seem to be susceptible of no other interpretation than that the action of the chief quartermaster, in the matter of distances, was intended to be conclusive. There is neither allegation nor proof of fraud or bad faith upon his part."

And the conclusion reached was (p. 401):

"His action can not, therefore, be subjected to the revisory power of the courts without doing violence to the plain words of the contract."

Again, in *Sweeney* v. *United States*, 109 U. S. 618, the judgment of the Court of Claims was adverse to the claimant. The opinion, by Chief Justice Waite, says (p. 620):

"This judgment is affirmed on the authority of *Kihlberg* v. *United States*, 97 U. S. 398. It was provided in the contract that payment for the wall was not to be made until some officer of the army, civil engineer, or other agent, to be designated by the United States, had certified, after inspection, 'that it was in all respects as contracted for.' The officer of the army designated under this authority expressly refused to give the necessary certificate, on the ground that neither the material nor the workmanship were such as the contract required. The court below found that there was neither fraud, nor such gross

mistake as would necessarily imply bad faith, nor any failure to exercise an honest judgment on the part of the officer in making his inspections."

The opinion of the Court of Claims in the same case is reported, 15 Court of Claims, 400, and is by Judge J. C. Bancroft Davis. It is somewhat more elaborate than that delivered in this court, and reviews a number of cases, English and American (pp. 411–413). It seems that in the Court of Claims the claimant offered to show by original evidence that the wall was actually built in all respects according to the contract, but the court refused to allow such proof, or to make any finding on that point.

This case is in two respects stronger than the two just cited.

1. Not only does no fault, or negligence, or bad faith of any kind appear, but the findings affirmatively show the exercise of the utmost care on the part of the engineer in charge in the examination of this stone before he approved the same (Finding IV, p. 35).

2. While the court, as in the *Sweeney Case*, makes no direct finding of its own as to the quality of the stone, it does go so far as to find facts which lead to an irresistible inference that the stone was in all respects suitable for use under the contract. It finds (Finding IV, p. 35):

"Tenino sandstone had in fact been used as a lining in the fire box of the boilers at the Tenino quarry for some time; also in the piers of a bridge over the Chehalis River, on the Northern Pacific Railroad, where it was exposed to the action of salt water, and had been so for a number of years without deterioration, and had also been used with success in a number of buildings in western Washington and Portland, Oreg. some of them very high ones."

In the recent case of *United States* v. *Gleason*, 175 U. S. 588, the judgment of the engineer is repeatedly referred to as the important and, indeed, conclusive element of decision in such cases, and the result is stated (pp. 608, 609):

"Our conclusions are that, under a proper construction of the contracts in this case, the right or privilege of the contractors, if they failed to complete their work within the time limited, to have a further extension or extensions of time, depended upon the judgment of the engineer in charge when applied to to grant such extension and that no allegation or finding is shown in this record sufficient to justify the court in setting aside the judgment of the engineer as having been rendered in bad faith, or in any dishonest disregard of the rights of the contracting parties."

Kennedy v. *United States*, 24 C. Cls. 122, involved the precise question at issue in this case,—whether the decision of the engineer in charge, or of the bureau at Washington, was to control. It was held (p. 140) that—

"While the engineer in charge might take the opinion of the Chief of Engineers upon the expediency of extending the time, the fact that he did so did not abdicate his power under the contracts, but left inherent in him a discretion under that clause of the agreements."

While the judgment of the Court of Claims in that case was for a large amount, exceeding that rendered in the present case, the government rested content with the judgment, and took no appeal.

The decision of the Circuit Court of Appeals in *Ogden* v. *United States*, 60 Fed. Rep. 725, is based upon the same view. The court there says (pp. 726, 727):

"This particular work was in charge of a captain of engineers in the United States army. No referee more accessible, competent, or impartial, could be suggested

than such officer should have been. In the absence of fraud, or such gross error or mistake as would imply bad faith, his decisions must be upheld as conclusive on the appellants. The proof does not show fraud or such gross mistake in the action of this referee. That a court acting on the testimony in the record might have decided differently from the referee in the matter of the appellants' claim does not warrant the setting aside the decision of the engineer in charge of the work."

This decision points to the importance of the fact that the officer was "accessible,"—following, in this respect, *United States* v. *Shrewsbury*, 23 Wall. 508, 517, above quoted.

Stipulations of this kind in contracts are not peculiar to government work. In *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, a railroad construction contract provided that the company's engineer should determine in all cases the quantity of the several kinds of work to be done and the compensation earned by the contractor at the rates specified, and that his estimate should be final and conclusive. It was held that the contractor could not recover in opposition to the estimate of the engineer in the absence of fraud, or such gross mistake as necessarily implied bad faith.

Chicago & Santa Fe R. R. v. *Price*, 138 U. S. 185, presents the converse of the last case. There it was claimed by the railroad company that the estimates made by its own engineer were too large. The court said in answer to that proposition in language which might well be applied to the present case (p. 194):

"The only difference between that case and the present one is that the alleged mistakes of the engineer in the former were favorable to the railroad company, while in this case they are favorable to the contractors. But that difference can not affect the interpretation of the contract. In the present case the agreement was that the work

should be executed under the direction and supervision of the chief engineer of the railroad company and his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work should be determined, and 'whose determination shall be conclusive upon the parties.' Any decision of the chief engineer relating to the execution of the contract was to be 'binding and final upon both parties.' His measurements and calculations as to excavations were made 'final and conclusive.'"

In another case, *Elliot* v. *Missouri, Kansas & Texas Railway Co.* 74 Fed. Rep. 707, a railroad company questioned the judgment of its own inspector, but the Circuit Court of Appeals held that the count of railroad ties, which formed the subject of controversy in this case, as made by the inspector must be conclusive against the railroad, as it would have been conclusive in its favor had his decision been the other way.

Sub-Contracts.

The court of Claims in its opinion considers (pp. 51,52) a defense interposed by the United States arising out of the sub-contracts with the Tenino Stone Company, owners of the quarry (p. 36), and with Albert and Louis Beaudette, stonecutters, to cut the same (p. 37), and the fact that the owners of the quarry have not brought suit against the claimants for the value of the stone which they furnished (Finding VII, p. 42). In response to this suggestion the Court of Claims cites *Masterton* v. *Mayor of Brooklyn*, 7 Hill, 61, which holds that in a case like this the rights of sub-contractors are those of their principals. The Supreme Court of New York, in the opinion delivered by Chief Justice Nelson, afterwards a member of this court, said:

"The fact that these sub-contracts must ordinarily be entered into preparatory to the fulfillment of the princi-

pal one shows the injustice of restricting the damages, in cases like the present, to compensation for the work actually done and the item of materials on hand."

The execution of the contract and the incurrence of expenses by sub-contractors was in legal effect the same as if it had been done by the principal contractors. The claimants are entitled to treat the actions of sub-contractors as their own. The sub-contractors have no right to maintain an action like this, in their own names, for the damages they have sustained, as there is no privity of contract between them and the United States. The idea that the sub-contractors could, by bringing actions or recovering judgments against the principal contractors, claimants in this case, either enlarge or restrict the liability of the United States would be a legal solecism.

In *Chandler* v. *United States*, 17 C. Cls. 1, the Court of Claims applied this doctrine as a defense to a claim. The contractor there brought his action more than six years after he had incurred the expenses, but within six years after he had paid them. The court decided that the claim accrued when the expenses were incurred, and that the time of payment, or whether he had paid them at all, was immaterial. It said (p. 11): "His right to recover from the defendant was not contingent upon the payment of his own debts."

The presumption is that so far as items for expenses incurred or work done by sub-contractors are concerned this suit was brought and is being prosecuted for their benefit. Ample means exist in the law for the protection of their rights and for a recovery over against these claimants in case they are ultimately entitled to the money.

In *Hobbs* v. *McLean*, 117 U. S. 567, this court sustained a bill in equity against a government contractor, who

had recovered a judgment in the Court of Claims, in behalf of a partner whose name was not disclosed by the contract, but who had advanced the money to enable the contractor to execute it.

In *Price* v. *Forrest*, 173 U. S. 410, a receiver appointed by a State court for the benefit of creditors of a claimant against the Government was held entitled to receive from the United States an amount appropriated to that claimant by a special act of Congress.

All such remedies are open to sub-contractors as against the principal contractor. But they can not be heard in this proceeding, which was instituted and is prosecuted, as it necessarily must be, in the name of the principal contractors alone.

The action of the court, therefore, in allowing for the increase of cost in carrying out the contract, made necessary by the action of the Department in ordering a more expensive stone than had met the approval of the engineer as a suitable one for the work, was correct. Its judgment, so far as concerns that item, should be affirmed.

Extra Foundations for Boilers and Boiler-House.

The next item in dispute is one of six hundred and ninety-six dollars and sixty-eight cent ($696.68), for extra foundations for the boilers and boiler-house. The facts in regard thereto are contained in Finding VIII (pp. 42, 43) as follows:

"The plans for the foundations of the boilers and boiler-house were submitted to the civil engineer in charge of the work and approved by him, and the work was then done on said foundations in accordance with the directions of said engineer. The foundation for the boiler-house was completed and accepted by said engineer and included in his monthly estimate and paid for. The foundations for the boilers were made in accordance with

the drawings so submitted to said engineer, and were completely laid at about the time the engineer first in charge of said work was detached therefrom. Subsequently another engineer was placed in charge of the work. In his opinion the foundations were imperfect and insecure because of defective construction on the part of the claimants and he required that they be relaid. The claimants, protesting that it was not competent to require them to change the foundations after they had laid the same to the acceptance of the engineer in charge at the time of the original construction, relaid the same in accordance with the direction of the engineer thus subsequently in charge. The matter was subsequently referred to the Chief of the Bureau of Yards and Docks, and he decided that the work was required to be done by the terms of the contract. It does not appear that the claimants appealed to the Chief of the Bureau before doing the work, or that it was ordered by him."

Upon the ground stated in the last sentence this item was disallowed by the Court of Claims.

It will be observed that this item is not so much for the performance of extra work in the strict sense of that term as it is for doing twice what the contract required the contractors to do but once.

The foundations of the boiler-house and boilers were entirely completed and the former had actually been paid for under the terms of the contract allowing payment of all but the retained ten per cent. They had been inspected and approved by the engineer in charge. They were no more subject to be required to be relaid than could the claimants have been required after constructing the entire dock to take the same up and reconstruct it according to the changing views of new officers who might by that time have been placed in charge of it.

In *Dialogue* v. *United States*, 22 C. Cls. 196, the court makes the following remarks as to the authority of an officer ordering extra work (p. 204):

"The findings show that Naval Constructor Hartt was detailed on the 11th day of November, 1876, and from that time supervised and superintended the execution of the contract and directed from time to time what extra work should be performed by the contractor. Hartt became and was from the time of his detail the responsible and authoritative agent of the United States, and as such ordered and directed the claimant not only in the performance of the agreement as to the work specially provided by the contract, but also in the addition of such extra work as they might agree from time to time to attach to the original undertaking. It was a contemporaneous construction of the parties which determined and fixed the liability beyond the power of repudiation upon the part of either. *Scott* v. *United States*, 12 Wall. 444, and 7 Ct. Cls. R. 226; *Eastern Railroad Co.* v. *United States*, 20 Ct. Cls. R. 45."

If this is true as to extra work ordered, how much more is it as to the performance of the agreement as to the work provided for by the contract itself? If there can not be finality in such a case in the approval of the officer under whose direction each step is taken, no finality can ever be reached until the entire structure is completed and paid for, if even then.

As to the objection made by the Court of Claims to this item (p. 52) "that the claimants should have submitted the requirement of the engineer in charge to the Chief of the Bureau before proceeding with the work," it is with deference to the learned court submitted that the force of this objection is destroyed by the finding (p. 43) that "The matter was subsequently referred to the Chief of the Bureau of Yards and Docks, and he decided that the work was required to be done by the terms of the contract." Why was not a subsequent decision to this effect equivalent to one rendered to the same purport before the work was done? The authority was the same,

whether exercised before or after the performance of the work.

So the Court of Claims held in *Ford* v. *United States*, 17 C. Cls. 60, see particularly paragraphs VI and VII of the syllabus (p. 61), the former of which is as follows:

"VI. In applying the law of agency to the affairs of government, the courts have recognized the principle of ratification; and have held that ratification by the head of an executive department, or other responsible officer, will render an unauthorized contract effective and valid."

And the decision in that case was thus construed in the later case of *Haliday* v. *United States*, 33 C. Cls. 453, 464):

"In this connection it is not necessary to refer in detail to the findings on the question of the right of the claimants to recover for extra labor, because of the provisions of the contracts relating to the requirements of an agreement in writing and the direction and sanction of the officer having the superior power of directing the execution and completion of work. The items for which we allow in the conclusion of law and judgment were at the request or requirement of the officers or agents in the immediate direction of the work, and some of them by the sanction of the superior power, under circumstances indicating the good faith of the subordinates. The additions were necessary, as it was thought by those agents; the Government has received the value and benefit of them, which combination of circumstances brings the claim for extras within the spirit if not wholly within the letter of the case of *Ford* (17 C. Cls. R. 60)."

If the Chief of the Bureau of Yards and Docks had disapproved and repudiated the action of the engineer who ordered the relaying of these foundations, and had decided that the foundations as first laid were sufficient, a different question would be presented. It is submitted that this item should be allowed.

Concrete Toe to Protect Sheet Piling.

The next is a very small item stated in Finding IX as follows (p. 43):

"In the execution of the contract the claimants drove a line of sheet piling transversely across the brick discharge culvert at the end of the brick work. They then went on and drove the round piling forming the foundations for the brick work of the discharge culvert. In cutting off this round piling, however, they made a mistake and cut the piling off 32 inches below the point where it should have been. As soon as this error was discovered they reported it to the engineer, and suggested two methods of remedying the mistake. One was to start the brick work 32 inches lower than it was originally shown, and to carry up the excess of height of 32 inches in brick work. The other remedy was to build up with timbers on top of the piles according to the height where they had been cut off too low, and then start the brick work on top of the additional 32 inches of timber work. The Department accepted the latter plan and also required that they put in a concrete toe to prevent the teredo from attacking the sheet piling and timber work. The claimants put in the timber work as required, and made no charge for the same. They also put in a concrete toe, as required by the Navy Department. This concrete toe had no relation whatever to the error which had been made in the original construction of the sheet piling, but would have been required irrespectively of any such error having been made. The additional cost to the contractors amounted to $59.35."

This item speaks for itself. It was ordered by the Department itself direct. No question of its being required by a responsible officer can, therefore, be raised. It was allowed by the Court of Claims, and it is submitted that the allowance is correct.

Ramming and Sluicing Fillings.

The next item is stated in Finding X (pp. 43, 44), as follows:

"In refilling the dirt after the altars were in place no part of the filling was rammed or sluiced except the clay puddling. This was in accordance with the instructions of the engineer in charge of the work. The claimants discussed the matter with him, and he informed them that it was not required to be rammed or sluiced. He embraced the work done in that way in his monthly estimates, and the claimants received payment for a large portion of the work done in that way at the contract rate of 'Filling and grading per cubic yard, 30 cents.' In the latter part of August, 1894, however, there was a change in the office of engineer in charge of the work for the United States. The new engineer then placed in charge required the claimants to ram or sluice all back fillings. The claimants protested, insisting that the contract did not require anything more than depositing the material and evenly grading the surface to correspond with the grade of the station. The new engineer, however, required all the work to be thoroughly sluiced with water, and all but a small part thoroughly rammed, and the claimants did the work in that way under protest.

"The additional cost to the claimants of doing this work, over and above what would have been required had they not been required to ram or sluice the same, would be 10 cents a yard, making, for 37,227 yards, $3,722.70. The engineer who ordered the work to be done in the manner stated referred the question of so requiring it at the request of the claimants to the Chief of the Bureau of Yards and Docks, and the latter informed said engineer that the Department approved his requirement, for the reason, as shown by the Bureau, that the contract plainly required it."

This item was disallowed by the Court of Claims.

The action of the engineer first in charge was based upon the plain provision of the specifications, which, under the head of "Excavation and Grading," requires (p. 27):

"All earth excavated and not required for refilling or grading within the limits of structures is to be deposited within the limits of the station, at reasonable distances from the dock, where indicated by the commandant, not to exceed 1,000 feet from the dock, and brought up to the grade of the station as established."

The absence in this provision of any requirement as to ramming or sluicing is emphasized by the requirement under the head of "Puddling" (p. 31), which is as follows:

"Clay puddle, of the best quality to be obtained in the vicinity, shall be thoroughly rammed down behind the altars, following closely the securing of the latter, in the best manner, and extending to a depth of at least two feet from the lower side of the braces, measured at right angles to the slope. The different layers shall be thoroughly incorporated. It shall be free from all surface soil, sods, roots, and stones."

Why should clay puddle be expressly required by the specifications to be rammed down behind the altars and no such requirement be made in regard to other fillings? Under the rule *expressio unius exclusio alterius* the only legal construction of the specifications is that it required the ramming of clay puddle because that was regarded as necessary, and did not require the ramming of other fillings because it was supposed to be unnecessary. The specifications, it must be remembered, were prepared in the Navy Department (Finding II, p. 22), and the contractors had nothing to do but follow them under the explicit instructions of the engineer in charge.

The Court of Claims in *Simpson* v. *United States*, 31 C. Cls. 217, which was affirmed by this court 172 U. S. 372, said (p. 243):

"Further, the contract and specifications were drawn by the plaintiffs, and (following *Garrison* v. *The United States*, 7 Wallace, p. 690) 'its doubtful expressions should,

therefore, according to a well-known rule, be construed most strongly against the party who uses the language.'"

It would appear but just that the same rule should apply where, as in this case, the contract and specifications were drawn by the Government.

It would appear, too, that where for a long time the contract was construed by both parties as not requiring any such rammings, as was afterwards contended to be required by the contract, the case is a very strong one for the application of the rule of contemporaneous construction. Certainly after a large proportion of the work had been completed, as in this case, it should require a strong reason to induce the court to sanction any subsequent change of construction, where there is nothing in the specifications themselves warranting any such change.

The only ground which appears in the opinion of the Court of Claims for its failure to allow this item is (p. 52) "that the claimants should have submitted the requirements of the engineer in charge to the Chief of the Bureau before proceeding with the work. They were required to do so by the terms of the contract, and authority to compel them to do additional work was thereby reserved to the Chief of the Bureau."

But, in opposition to this ground, appears the express finding (p. 44), "The engineer who ordered the work to be done in the manner stated referred the question of so requiring it at the request of the claimants to the Chief of the Bureau of Yards and Docks and the latter informed said engineer that the Department approved his requirement, for the reason, as shown by the Bureau, that the contract plainly required it."

The allowance of this item is justified and required by the principles laid down in paragraphs numbered 1, 2 and 3 of the opinion of the Court of Claims in this case (Record, p. 49). It is submitted that it should be allowed.

Experiments with Water Jet by Order of Secretary of Navy.

This claim is set forth in Finding XI (pp. 44, 45) as follows:

"During the progress of this work it was discovered that the soil at the bottom of the dock was of a very tenacious and unyielding character, so as to be difficult of penetration for piles driven by the ordinary drop-hammer process, and was so reported by the contractors. On the 15th of February, 1894, it was stated that the round piles which were then being driven penetrated to a depth of from 8 to 10 feet. It was stated by the Bureau of Yards and Docks, on February 27, 1894, in answer to this statement, that while round piles penetrating from 8 to 10 feet, as now stated, may be satisfactory, depending upon the resistance shown by the first blow, yet the Bureau thought that these piles should be driven to a depth of 15 feet below the bottom of the excavation, if possible. A copy of this letter was furnished to the contractors, but when the report for piles driven in February was received it was found that the average of 76 piles driven on the 15th of February was 5 feet 0.77 inch, none going to 8 feet, and of the 57 piles driven on the 16th the average was 5 feet 0.60 inch, none going to 8 feet; and the average depth of the 891 piles driven in February was only 6 feet 0.82 inch. The general average for February was much reduced by the piles driven in the latter half of the month, after the attention of the contractors, as well as the civil engineer, had been called to the unsatisfactory depth reached by these piles. This report called forth from the Bureau other letters in March and April urging that the piles be driven to a greater depth and reiterating the instructions contained in the Bureau's letter of February 27. There was no claim made at this time by the contractors that they could not reach a greater depth than that hitherto reported. Thereupon the Bureau telegraphed definite instructions on the 13th of April to accept no piles driven to a less depth than 15 feet. The contractors made no attempt to show that they could not drive piles to that depth or to a greater

depth than had been obtained, but employed experts to give an opinion after tests upon the piles driven to show that the Bureau was wrong. In view of these facts, the Secretary of the Navy, on the 21st day of May, 1894, and upon the occasion of a visit to said dock by that official, verbally authorized and directed the contractors to sink the piles by a method known as the water-jet system; that is to say, by forcing water into the ground by means of a sink pipe operated by the hydraulic system, thus forming a hole into which the pile is set. The contractors objected to and protested against this method of driving the piles upon the ground that it destroyed and weakened the bottom of the pit, and subsequently a board of naval experts was convened for the purpose of reporting upon the advisability of sinking the piles by this system. The board reported adversely to this system, and recommended that the piles be driven in accordance with the provisions of the contract and by the ordinary drop-hammer process, the piles to be driven to a minimum of 6 feet. The remaining 696 piles, which were driven after this report by the drop-hammer process, reached an average depth of 10 feet 4 inches. The aforesaid board of naval experts, under the direction of the Secretary of the Navy, passed upon the expense to which the contractors had been put on account of this verbal order of the Secretary of the Navy to the contractors, requiring them to sink said piles by said water-jet system, and recommended an allowance to said contractors therefor in the sum of $1,156.76. The amount thus recommended by this board of engineers was approved by the Secretary of the Navy and a voucher therefor was drawn, but when the same came before the Auditor for the Navy Department for audit and before the Comptroller of the Treasury for payment, it was refused, upon the ground that the services required were not extra and additional, but that they were such as the contract contemplated, and upon the further ground that the Secretary of the Navy, under the specific requirements of section 7 of the original contract, had no power or authority to authorize or direct the incurring of this expense unless the cost of the same was first ascertained by a board of officers provided for that purpose before

the expense was incurred, and reduced to writing, as required by the seventh clause of the contract. Whereupon the Secretary of the Navy procured the reference of this item to this court under and pursuant to the provisions of Revised Statutes, section 1063.

"The reasonable value of the work set forth and described in this finding is $1,156.76."

This item was allowed by the Court of Claims.

According to the Comptroller of the Treasury, as quoted by the Secretary of the Treasury in his letter referring this item of claim to the Court of Claims (Record, p. 1):

"The principal questions at issue in this case are whether the Secretary had authority by oral direction to vary the terms of a written contract wherein was provided a formal method of varying such contract, and whether under the action taken by the Secretary, any claim arose in favor of claimants for extra compensation."

The question asked in the opinion of the Comptroller is answered by the judgment of the Court of Claims in *Ford* v. *United States*, 17 C. Cls. 60. The following paragraphs of the syllabus tersely summarize those parts of the decision material to this case:

"I. Courts can not transmute a contract into a statute of frauds, nor attach to the agreement of the parties the irrevocable, mandatory attributes of a statutory provision.

"II. A clause in a formal written contract providing that no claim shall be made for extra work unless first required and agreed upon in writing does not bind the parties. Such provisions were devised and inserted in building contracts to limit the power of architects and superintendents; but if the principals so act that the law will imply a contract for extra work, no prior agreement will render the transaction illegal or void.

"III. A provision in a written contract declaring that no claim for extra work shall be made unless it was required and agreed upon in writing is merely a condition, which may be waived by a subsequent oral agreement.

"IV. In applying the law of agency to the transactions of the government it has not been the purpose of the courts to curtail the lawful and reasonable powers of the executive."

This court went even further in *Clark* v. *United States*, 95 U. S. 539, and sustained a parol contract made by a mere subordinate with a party with whom the Government had no written contract whatever, after the contract had been executed and the Government had received the benefit of the services rendered or supplies furnished.

There could be no more direct authority for the performance of the work than that given by the Secretary of the Navy in person. A board of engineers afterwards recommended the allowance of one thousand one hundred and fifty-six dollars and seventy-six cents ($1,156.76) to the contractors, and the Secretary of the Navy approved the recommendation. Thus the strongest evidence was furnished of the authority for the work, and the view of the Navy Department that it was extra and additional to any requirement in the contract. The judgment of the Court of Claims allowed the same amount as did the board of engineers and the Secretary of the Navy.

The action of the Court of Claims in allowing this item should be affirmed.

Delay in Experimentation with Water Jet.

The facts in regard to this, the last item, are stated in Finding XII (p. 45), as follows:

"The delay incident to the experimentation with the water jet in driving piles, as stated in the last finding, extended from April 13, 1894, to July 5, 1894, a period of seventy days, exclusive of Sundays. The expense caused to the claimants by the defendants' officers in the suspension of the work was $2,625.

"The board named in the last finding reported in regard to the claim for these expenses as follows:

"'The board is of the opinion that the contractors are equitably entitled to a reasonable compensation for any additional expense incurred by them in the prosecution of the work in consequence of unusual delays that may be found to have been caused by the Government, but having no means of verifying the claim submitted for such additional compensation the board is unable to properly consider this question.'"

This item was allowed by the Court of Claims.

The principles upon which such an allowance should be based are those tersely stated by Chief Justice Waite in delivering the opinion of this court in *United States* v. *Smith*, 94 U. S. 214, 217, 218, as follows:

"In *Clark's Case*, 6 Wall. 546, it was decided that the United States were liable for damages resulting from an improper interference with the work of a contractor; and in *Smoot's Case*, 15 *id.* 47, that the principles which govern inquiries as to the conduct of individuals, in respect to their contracts, are equally applicable where the United States are a party. The same rules were applied in the case of the *Amoskeag Company*, 17 *id.* 592. Here the work was stopped by order of the United States. Smith asked to be released from his contract, unless he could go on. This was refused until the expiration of sixty days, when he was allowed to resume. As between individuals, certainly, this would be considered an improper interference, and damages would be awarded to the extent of the loss which was the necessary consequence of the suspension. The United States must answer according to the same rule. In this respect we can not consider this case different in principle from that of Clark, *supra*.

"The Court of Claims has found the amount of the damages to have been $5,000; that is to say, that sum, in its opinion, from the evidence before it, was necessary to place Smith in the same condition he would have been in if he had been allowed to proceed without interference, and not allowing anything for loss or injury to his materials, which he might have prevented by the exercise of reasonable care and prudence.

"This rule of damages, as an abstract proposition, is clearly right. Unless, therefore, there appears in the record some error growing out of the estimation of the amount, the judgment below should be affirmed."

Accordingly the judgment was affirmed.

This decision was followed in *United States* v. *Mueller*, 113 U. S. 153, where it was said (p. 156):

"The court was of opinion, that, as the delay was caused by a contemplated change of purpose in regard to the stone and the site, the enforced suspension and delay were unjustifiable, and not covered by the stipulations in the contracts that the stone and the work should be furnished as 'required.' 19 C. Cls. 591. We are of opinion that the court was correct in its view. *United States* v. *Smith*, 94 U. S. 214."

This item received the approval of the same board of engineers which approved the last one, but with the difference that the board fixed no amount, on which it expressed its inability to act in the absence of evidence. The finding of the Court of Claims shows the expense caused to be two thousand six hundred and twenty-five dollars ($2,625). The action of the Court of Claims in the allowance of this sum should be affirmed.

Conclusion.

In the argument of this case we have purposely pursued a line in some respects different from but in no degree conflicting with that adopted by the learned Chief Justice of the Court of Claims in delivering the opinion of the court (pp. 46–52). This has been done solely for the sake of avoiding repetition. We respectfully call the special attention of the court to that opinion as setting forth most ably and, we submit, conclusively, the principles which should govern the determination of this case.

The only complaint which these claimants, as appell-

ants in No. 128, have to make is that, as to two items rejected by the Court of Claims, the application of the very principles laid down by the court in its opinion appears to us to warrant and require their allowance.

It is asked that the judgment of the Court of Claims in favor of the claimants for twenty-four thousand nine hundred and forty-two dollars and ninety-nine cents ($24,942.99) be affirmed for the full amount of the award made to the claimants, and that an additional amount of four thousand four hundred and nineteen dollars and thirty-eight cents ($4,419.38) should be allowed for the two items of extra expense referred to.

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